revenues on line 418 of the FCC Form 499-A. This classification was correct, because Grande's finished service was an information service and Grande did not separately offer to end users a transmission service. The Commission, therefore, should affirm Grande's reporting of its DSL revenues for the years in question.

USAC misinterprets the *Wireline Broadband Order* to require Grande retroactively to alter its classification of DSL services and report a "transmission component" to the service until August 13, 2006. The *Wireline Broadband Order* does not impose such a requirement. Instead, the *Wireline Broadband Order* confirms that Grande's service is indeed an information service with no separate transmission component. Moreover, the transitional reporting of USF revenue adopted in the *Wireline Broadband Order* required carriers that were offering a separate transmission component to "continue" to do so, but it did not require carriers that did not offer a separate transmission component to begin reporting their revenues.

Finally, even if Grande was required to report a "transmission component" for a portion of this period, USAC grossly overestimates the amount of revenue that should be reported. USAC has classified 100% of Grande's DSL revenues as telecommunications, even though only a small portion of those revenues would represent the transmission component of the service. If the Commission agrees with USAC's classification, Grande should be given the opportunity to calculate the portion of its revenues that are attributable to transmission, while reporting the information service components on line 418 of the Form.

C. Grande's DSL Service Is an Information Service

At the outset, there is no dispute regarding the nature of Grande's DSL-based Internet access services. The Commission defined wireline broadband Internet access services as

a "service that uses existing or future wireline facilities of the telephone network to provide subscribers with Internet access capabilities."[46] Importantly, the Commission found that wireline broadband Internet access service "is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service."[47] The Commission concluded that this service is an information service under the Commission's rules.[48]

Next, the Commission explicitly examined the legal classification of the transmission component underlying facilities-based wireline broadband Internet access service.[49] The Commission addressed this classification in two instances, when offered as a wholesale input to third parties and when used by the provider in its own end user service. Grande does not offer DSL-based services as a wholesale service, so the first situation is not impacted here. With respect to a facilities-based provider's end user services, the *Wireline Broadband Order* concluded that the provider does not offer separate information services and telecommunications services to customers. As the Commission explained:

> [W]e reject arguments that companies using their own facilities to provide wireline broadband Internet access service simultaneously provide a telecommunications service to their end user wireline broadband Internet access customers. ... [T]he fact that the Commission has, up to now, required facilities-based providers of wireline broadband Internet access service to separate out a

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46 *In re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 9 (2005) ("Wireline Broadband Order"). The Commission noted that wireline broadband Internet access services could be provided using many underlying technologies, including DSL. *Id.* n. 15.

47 *Id.*

48 *Id.*, ¶ 12.

49 It is not clear whether the term "facilities-based" in this context includes providers such as Grande. *See* infra, p. 21.

> telecommunications transmission service and make that service available to competitors on a common carrier basis under the Computer Inquiry regime has no bearing on the nature of the service wireline broadband Internet access service providers offer their end user customers. We conclude now, based on the record before us, that wireline broadband Internet access service is, as discussed above, a functionally integrated, finished product, rather than both an information service and a telecommunications service.[50]

In other words, even though a "facilities-based" provider had an obligation to offer a transmission product to competitors, the Commission did not require such providers to offer the service that way to end users. Providers were free to offer a functionally integrated, finished product if they chose to do so. Thus, when the transmission component is self-provided in a carrier's own wireline broadband internet access service (as opposed to when it is offered to *third parties* as a wholesale input), the service does not include the provision of a telecommunications service to the end user. In such an instance, there is no telecommunications service revenue to report for USF purposes.

Grande has never offered a stand-alone transmission service to DSL customers, nor has it unbundled a transmission component from the finished product. Instead, Grande has always offered its DSL-based Internet access services as a "single, integrated service" that "combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications (*e.g.*, e-mail, web pages, and newsgroups)."[51] Grande's service is an information service. Moreover, Grande's end user service did not include a separate transmission component. As the Commission confirmed in the

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50 *Wireline Broadband Order*, at ¶ 105 (emphasis in original).

51 *See id.*, at ¶ 14.

Wireline Broadband Order, when Grande offered DSL service to end users it did not offer "both an information service and a telecommunications service."[52]

D. USAC's Conclusion that the *Wireline Broadband Order* Required Grande Retroactively to Alter its Classification of DSL-based Services is Erroneous

In USAC Management's response to Grande's comments on the draft audit findings, USAC asserts that the *Wireline Broadband Order* required Grande to report revenues for the transmission component of its DSL-based services until August 13, 2006. Describing the *Wireline Broadband Order*, USAC Management contends that:

> The order went on further to state that facilities-based providers of wireline broadband Internet access services must continue to contribute to existing universal service support mechanisms based on the current level of reported revenue for the transmission component of its wireline broadband Internet access services for a 270-day period after the effective date of the Order.[53]

As noted above, USAC's interpretations are not due any deference in this appeal. The Commission must determine, *de novo*, whether Grande is required, retroactively, to alter its classification of its DSL-based services as information services. Grande respectfully submits that the *Wireline Broadband Order* does not support such a conclusion.

First, as Madison River noted in its appeal, neither the *Wireline Broadband Order* nor the *Computer Inquiry* Orders specifically define "facilities-based" carriers in this context.[54] The Commission has never ruled whether CLECs, whether providing services exclusively using their own facilities or through a combination of their own facilities and UNEs, are "facilities-based" carriers subject to the *Computer Inquiry* obligations. Thus, it is not clear whether CLECs

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52 *Id.*, at ¶ 105.

53 Audit Report at 32 (citing *Wireline Broadband Order*, ¶ 113).

54 Madison River Appeal at 6-7.

ever had an obligation to offer a separate transmission component to third parties. If, as Madison River contends, CLECs did not have this obligation, then USAC's position obviously is in error.[55]

Second, the *Wireline Broadband Order* does not alter the *status quo* practices of carriers. The paragraph relied upon by USAC establishes a temporary transition for carriers that already were reporting telecommunications revenues associated with wireline broadband Internet access services. Nothing in the Order purports to require providers that already treated their services as a single, integrated information service to reverse course and report a transmission component of services.

The Commission was quite clear that under "existing rules and policies," only providers offering broadband transmission services were required to contribute to the Universal Service Fund.[56] Providers that only offered information services, however, were not subject to current contribution obligations. To the contrary, the Commission recognized that the question of whether *other facilities-based providers* of wireline broadband services "may, as a legal matter, or should, as a policy matter, be required to contribute" is a pending question.[57] The Commission pledged to address this issue in a future order of the Commission. Thus, wireline

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55 In any event, USAC lacks authority to interpret the *Wireline Broadband Order*. 47 C.F.R. § 54.702(c). Given that the term "facilities-based providers" is not defined in the *Wireline Broadband Order*, USAC lacked authority to issue the ruling that it did. Grande urges the Commission to enforce its rule that limits USAC to administering the FCC's rules.

56 *Wireline Broadband Order*, ¶ 112 ("In the *Wireline Broadband NPRM*, the Commission recognized that, under its existing rules and policies, telecommunications carriers providing telecommunications services, including broadband transmission services, are subject to universal service contribution requirements").

57 *Id.*

broadband providers that were not offering a separate broadband transmission service were not under any current obligation to contribute to the USF.

The Commission's transitional instruction that "facilities-based providers of wireline broadband Internet access services must continue to contribute [to the USF]" must be read in context with this statement of current obligations of providers to contribute to the USF. By requiring providers to "continue" to contribute to the Fund, the Commission clearly was not expanding the USF reporting obligation beyond those who were currently reporting telecommunications revenues. A logical reading of this statement is that the requirement applies only to carriers that *already were required* to make such contributions. Indeed, the Commission required providers to continue contributing "based on the *current* level of reported revenue for the transmission component" of the service.[58] Those entities that did not have a current level of telecommunications revenue to report had nothing to "continue" to report.

This interpretation also is consistent with the Commission's stated rationale for the transitional obligation. The Commission adopted the transitional requirement pursuant to its "authority to take interim actions to preserve the *status quo*."[59] It described the action as necessary "to preserve existing levels of universal service funding" and to prevent "a precipitous drop in fund levels while we consider reform of the system of universal service."[60] Only providers that already offered a separate transmission component were currently contributing to the Fund. Only their "continued" contributions could preserve existing levels or avoid a

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58 *Id.* (emphasis added).

59 *Id.*

60 *Id.*

precipitous drop in USF funding. Accordingly, only entities that already were contributing to the Fund were subject to the transitional requirement.

For those providers that were not currently contributing to the USF, there was no indication that the Commission intended the *Wireline Broadband Order* to have the effect of retroactively requiring CLECs to begin unbundling wireline broadband services into a separate transmission component and an information services component. Such an obligation flies in the face of the Commission's conclusion that wireline broadband Internet access service offered to end users does not include such separate components.[61] Moreover, it would make no sense to require a provider to alter its services in order to contribute to the USF solely for a 270-day transition period, only then to revert back to the *status quo* after the transition ended. The Commission, therefore, should affirm in this appeal that Grande was not required to contribute to the USF based on revenues it received from DSL-based Internet access services offered as information services to end users.

E. Even If Grande Was Required to Contribute to the USF on the Transmission Component of Its Service, USAC Incorrectly Classified the Entire Revenue Amount as Interstate Telecommunications Services

As shown above, Grande correctly classified its DSL-based Internet access service as a single, integrated information service for USF purposes. Even if the Commission were to conclude (wrongly) that Grande was required to report a transmission component to its DSL service, the USAC Audit would still be in error. Specifically, USAC erred by reclassifying all of Grande's DSL-based revenue as telecommunications, rather than reclassifying the portion

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61 *See, supra*, pp. 19-20.

of the total revenues that would represent the "transmission component." As a result, USAC grossly overstates any USF contribution obligations that might be due.

USAC reclassified 100% of Grande's DSL revenues as telecommunications services. At p. 28 of the audit, addressing the 2007 Form 499-A, USAC states that it was reclassifying "DSL revenue" to line 406 and that such revenue "is 100% interstate."[62] Similarly, addressing the 2006 Form 499-A, USAC states that, "the Carrier reported DSL revenue on Line 418. This revenue should be reported on Line 406."[63] Thus, for both years in which it reclassified DSL-based revenues, USAC classified 100% of Grande's end user DSL revenue as interstate telecommunications services.

USAC reclassified all of the revenue as telecommunications, despite acknowledging that, at most, only the *transmission component* of the service could be subject to USF during the transition period.[64] By USAC's own acknowledgement, non-transmission aspects of DSL revenues would not be subject to USF under any theory. For example, Grande's DSL services included Internet access, email, personal web storage and access to premium content. These services clearly are information services, and revenues attributable to them are not subject to USF. Moreover, Grande offered two premium tiers of DSL-based services, each offering additional non-telecommunications services to end users, such as expanded web storage

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62 Audit Report at 26.

63 *Id.* at 38. Later, addressing the jurisdictional classification of the subject revenue, USAC classifies 100% of the DSL revenue as interstate. *Id.* at 40.

64 *See* Audit Report at 32 ("USAC Management agrees with IAD that *revenues for the transmission component* of the Carrier's DSL product billed before August 13, 2006 were subject to USF and must be reported on Line 406") (emphasis added).

or additional email addresses. The revenue over and above the basic tier's transmission charge is not subject to USF contribution obligations under any theory.

As a result, the audit grossly overstates the amount of USF that would be owed, if Grande had an obligation to segregate a transmission component to its finished Internet access product. If the Commission concludes that Grande must reclassify a portion of its DSL revenues, the company should be given an opportunity to identify the portion of its revenue that is attributable to transmission.

IV. ISSUE: DID GRANDE APPROPRIATELY CLASSIFY REVENUE FROM RESELLER CUSTOMERS?

Grande seeks *de novo* review of Grande's reporting of revenues from reseller customers on its FCC Form 499-As. In this section, Grande seeks review of the following amounts reclassified by USAC from block 300 (wholesale revenues) to block 400 (end user telecommunications revenue):

Finding No. 1 (Networks 2005 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (p. 19)

Finding No. 1 (Networks 2006 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (p. 20)

Finding No. 1 (Networks 2007 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (p. 20)

Total Amount Reclassified: [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]

In addition, Grande seeks review of the following amounts in PRI trunk service, tail circuit and special circuit revenues that USAC refused to classify as wholesale services:

Finding No. 3 (Networks 2006 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (pp. 36, 39)

Finding No. 4 (Networks 2005 Form 499-A) [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] (p. 45)

Total Amount Reclassified:

Grande highlights that this appeal implicates a question repeatedly raised in USF appeals before the FCC, namely the standard that wholesale carriers must satisfy in order to classify revenues as reseller revenue in block 300 of the FCC Form 499-A. The Bureau addressed this question most recently in an Order issued in August 2009 involving Global Crossing Bandwidth, Inc.[65] An application for review is pending of that decision.[66] In addition, the question is pending in a number of appeals presently before the Bureau, including:

ILD Telecommunications, Inc. and Intellicall Operator Services, Inc., WC Docket No. 96-45 (filed 03/31/06) (supplemental appeal filed 06/05/06)

IDT Corp. and IDT Telecom, WC Docket No. 96-45 (filed 04/10/06) (filing years 2003-05)

IDT Corp. and IDT Telecom, WC Docket No. 96-45 (filed 06/30/08) (filing years 2006 and 2007)

Network Enhanced Telecom, LLP, WC Docket No. 06-122 (filed 06/29/09)

Grande's experience is consistent with the experiences of the wholesale carriers in the above appeals. USAC has been applying an increasingly unrealistic standard for the classification of revenues as "carrier's carrier" revenues. The resulting rigidity with which USAC approaches the issue has imposed on wholesale carriers a virtually insurmountable burden to support its classification. Grande submits that the Commission must reign in USAC's

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65 *Request for Review of Decision of the Universal Service Administrator by Global Crossing Bandwidth, Inc.*, Order, CC Docket No. 96-45, DA 09-1821 (rel. Aug. 17, 2009) ("Global Crossing Order").

66 Global Crossing Bandwidth, Inc., Application for Review, WC Docket No. 96-45 (filed Sept. 16, 2009).

aggressive interpretation and restore the allocation of responsibility between wholesale and retail providers that was established in the *Universal Service Orders*.

A. Statement of Facts

Throughout the audit period, Grande operated as a wholesale carrier for other telecommunications providers. Grande (through its subsidiary, Networks) offers a suite of services for other carriers, including domestic and international switched access terminations, originating local access, two-way local access, metro access networks, managed modem services and carrier collocation.[67] Grande sells its carrier services through a dedicated wholesale team that is separate from the end user sales organization. Grande's carrier team negotiates individual contracts with customers, which include a Master Services Agreement (MSA) and service-specific Supplements.[68] These agreements are specifically designed for resale purposes and contain provisions that are only applicable in the context of resold telecommunications services. In addition, MSAs are multi-year contracts and typically contain automatic renewal provisions. Individual services are added and deleted during the course of the relationship via Service Order Forms, but the MSA typically remains unchanged for the duration of customer's relationship with Grande.[69]

Each carrier is verified as a telecommunications carrier and is evaluated for credit-worthiness.[70] Moreover, the services require carrier-grade interconnection arrangements at a carrier POP or in a collocation arrangement. These services are not available to end user

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67 Declaration of Kristene Stark, ¶ 4, attached as Exhibit 7 ("Stark Declaration").

68 *Id.*, ¶ 5.

69 *Id.*

70 *Id.*, ¶ 6.

customers.[71] Grande's accounting department collects tax exemption certificates for each reseller customer.[72] Grande's Legal Department also collects customer name, contact information and maintains a copy of the agreements for reference.[73]

In addition, when a customer's qualifications as a carrier are in doubt, Grande's regulatory department is asked to conduct further due diligence on the customer. Typically, the regulatory department is asked to verify reseller certifications obtained from the FCC and/or the Texas PUC to confirm that the customer is an authorized telecommunications carrier.[74]

USAC used the following process to verify Grande's classification of reseller revenue. First, Grande supplied USAC with a list of its resellers, filer ID and contact information, and associated revenue, by year.[75] USAC identified resellers that were actual contributors to the FUSF by comparing the Filer ID to a USAC database of contributors for each filing year.[76] If the Filer ID was not found in the USAC database, or if Grande did not have a Filer ID on file, USAC "requested reseller certifications and/or FCC printouts."[77] USAC requested this information from a sample of resellers for each year.[78]

Grande did not have reseller certifications for the resellers in question, but supplied other reliable proof to support its conclusion that the customers were resellers. This

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71 *Id.*, ¶ 7.

72 *Id.*, ¶ 8.

73 *Id.*

74 *Id.*

75 *See* Audit Report at 7, 18.

76 *Id.* If a reseller was confirmed to be a contributor in the filing year, USAC accepted Grande's classification of these revenues as wholesale revenues.

77 *Id.* at 18.

78 *Id.* at 7-8. Specifically, USAC requested certifications for 10 resellers from the 2005 Form, 16 resellers from the 2006 Form and 20 resellers from the 2007 Form. *Id.*

included (a) copies of the MSAs, (b) current printouts from the FCC's public USF database, (c) quarterly filer reports submitted by USAC during the time periods in question, (d) evidence of the customers' FCC 214 authorizations, and (e) name change information or alternative FCC Filer IDs.[79]

Except where USAC could identify the reseller as an actual contributor, USAC rejected Grande's proof with little substantive discussion. MSAs were rejected if they "were [not] signed within the appropriate period."[80] Further, MSAs were rejected on the ground that the contracts did not have "valid language that certified the reseller as a contributor to the USF."[81] USAC did not accept the FCC USF database printouts because "the printouts were dated June 10, 2009, and showed the proposed reseller's contributor status on that date."[82] Records showing a carrier's name change or showing alternative filer IDs were rejected as "either not applicable for the audited years, or the new company name provided was not a contributor for the audited years as well."[83] USAC rejected evidence of a carrier's section 214 authorization because such authorization "does not indicate that the filer has a Filer ID, and the Instructions state that the Filer ID, not the FCC 214 number, should be maintained."[84]

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79 *See* Audit Report at 12-13, 14-17 (Grande Response to draft audit finding).

80 *Id.* at 7-8.

81 *Id.*

82 *Id.* at 19. The Audit Report does not specifically discuss evidence derived from USAC's quarterly FCC filings during the audit period, which will be discussed *infra* in this appeal. It is not clear whether USAC rejected this information for the reason cited here, or whether it failed to consider the evidence.

83 *Id.*

84 *Id.*

Despite this, USAC made several reductions in the amount of revenue that it initially proposed to reclassify as end user revenue for Grande. Ultimately, USAC reclassified **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** in revenues from non-contributing reseller customers deemed to be end users.[85] A list of the resellers reclassified as end users was obtained from USAC and is attached as Exhibit 8.

In addition, USAC reclassified a significant amount of revenue from PRI trunks, "tail" circuits and "special" circuits provided by Grande. Grande explained that most of these circuits were provided as wholesale local loops to other telecommunications carriers for resale as part of the carrier customer's end user telecommunications services.[86] USAC denied Grande's proposed classification of the services as wholesale.[87] USAC's sole explanation for rejecting this classification was that, "based on our review of the additional documentation, [USAC] could not conclude that the customers were reselling the services."[88]

B. Summary of Argument

The FCC recently confirmed that the Form 499-A Instructions are only guidelines for verifying a customer's status as a reseller. Filer compliance with the 499-A Instructions is not mandatory to meet the "reasonable expectation" standard. Specifically, wholesale carriers may classify customers as a reseller after reliance on the verification procedures in the Instructions or based on "other reliable proof" of a customer's reseller status.

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85 *Id.* at 19-20 (revised effects tables).

86 *See* Audit Report at 29 (Grande Response to draft audit finding).

87 *Id.* at 31, 32-33.

88 *Id.*

The record in this proceeding shows that Grande relied on a combination of evidence to classify its customers as resellers. Ultimately, USAC credited Grande's proof with respect to many of its customers, including such well-known carriers as **[BEGIN CONFIDENTIAL]** . **[END CONFIDENTIAL]** With respect to the remaining carrier customers, Grande similarly had reliable proof (1) that the customer incorporated purchased telecommunications service into its own telecommunications offerings and (2) that the customer could reasonably be expected to contribute to the USF based on those revenues. In particular, where the reseller is confirmed to be a telecommunications carrier, certifies via a tax exemption that it is incorporating the purchased services in its own end user services and demonstrates that it is not exempt from direct contributions (such as under the *de minimis* standard), the wholesale carrier has met its burden.

Importantly, USAC's interpretation imposes an unreasonably high burden on the wholesale carrier. Not only does this burden in effect make the wholesale carrier a guarantor of its customers' compliance with FCC obligations, but it unlawfully leads to double recovery of USF from the same subject revenues. Grande uncovered evidence that USAC in fact was seeking double recovery from both Grande and from one of its reseller customers. Grande submitted this evidence to USAC, but USAC persists in seeking double recovery. The Commission should stop USAC from pursuing double recovery here, and should take steps to prevent USAC from doing so in the future.

C. Wholesale Carriers May Classify Revenues As Wholesale Revenues So Long As They Have A Reasonable Expectation That The Reseller Would Contribute

The FCC Form 499-A requires filers to report revenues in one of two categories: revenues from end users and revenues from resellers or "carrier's carrier" revenues. The FCC defines a reseller as a "a telecommunications carrier or telecommunications provider that: 1) incorporates purchased telecommunications services into its own telecommunications offerings; and 2) can reasonably be expected to contribute to federal universal service support mechanisms based on revenues from such offerings when provided to end users."[89]

The Form 499-A instructions recommend filers confirm a customer's reseller status by collecting specific information including name and filer identification number; searching and reviewing results from the Commission's USF contributor database, and collecting annual certifications stating that the customer is reselling the services it purchases.[90] The specific procedures recommended by the Instructions changed each year during the audit period. For example, the Instructions in 2005 recommended:

> If a filer does not have independent reason to know that a reseller satisfies these criteria, it should obtain a signed statement certifying that these criteria are met.[91]

By 2007, the Instructions had dropped the reference to having an independent reason to support a reasonable expectation and purported to mandate an annual reseller certification in all cases, stating:

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89 Telecommunications Reporting Worksheet, FCC Form 499-A, Instructions at 19 (2009) ("2009 499 Instructions").

90 *See, e.g.*, 2007 Form 499-A Instructions at 18.

91 2005 Form 499-A Instructions at 18.

> Each year, the filer must obtain a signed statement from the reseller containing the following language: [required language omitted].[92]

A filer's compliance with these suggestions will support a finding that the filer had a reasonable expectation that its customers were resellers. However, the FCC recently confirmed that the Form 499-A Instructions are only guidelines and filer compliance with them is not mandatory to meet the "reasonable expectation" standard.[93] Specifically, in the *Global Crossing Order*, the Wireline Competition Bureau acknowledged that "a wholesale carrier may establish its reasonable expectation in ways other than those listed in the Form 499-A Instructions."[94]

A wholesale carrier may satisfy obligation in three ways: (1) by demonstrating that it has "affirmative knowledge that its customer is contributing to the universal service fund as a reseller," (2) by demonstrating a reasonable expectation that the reseller will contribute "based on guidance provided in the FCC Form 499-A instructions," or (3) by demonstrating a reasonable expectation that the reseller will contribute based on "other reliable proof."[95]

D. Grande Networks Reasonably Expected Its Reseller Customers Would Contribute to the USF

In this appeal, the Commission must evaluate Grande's evidence in light of the above standard. As discussed above, Grande Networks had the option of utilizing the Form 499-A reseller verification guidelines *or* basing its determination on "other reliable proof" that its customers were resellers. Grande Networks chose to conduct its own due diligence and that

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92 2007 Form 499-A Instructions at 19.

93 *Global Crossing Order*, ¶ 16.

94 *Id.*, ¶ 17.

95 *Id.*, ¶ 14.

review revealed facts that supported Grande Networks' reasonable expectation that its customers were reselling telecommunications services to end users and could be expected to contribute to the USF. This evidence is discussed below.

1. The presence of a customer in USAC's quarterly USF Contribution Factor reports is sufficient to form a "reasonable expectation" that a customer is a reseller

As part of its administrative duties over the USF program, USAC prepares and submits to the Commission, a quarterly report of projected revenues and obligations of the USF. This report attaches a list of the carriers have filed the quarterly Form 499-Q report, and is used by the FCC to set the quarterly USF contribution factor.[96] The Form 499-Q is filed only by carriers[97] - not end users – and is used by USAC to assess the filer's quarterly USF contributions.[98] As the Commission explained, carriers file Quarterly Telecommunications Reporting Worksheets ("quarterly Worksheet" or "Form 499-Q") to determine their monthly universal service contribution amounts.[99] Any entity listed on USAC's quarterly report is a carrier, is not *de minimus* and presumably is paying the USF contribution invoices issued by USAC based on the quarterly Form 499-Q filings. An entity's inclusion in these quarterly USAC reports, therefore, is conclusive proof that the entity is a carrier that is reasonably expected to contribute to the USF. The Commission should rule that Grande Networks' review

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96 *See, e.g.*, Universal Service Administrative Company, Federal Universal Service Support Mechanisms Quarterly Contribution Base for the Second Quarter 2002, Appendix M5, CC Docket 96-45 (filed Mar. 1, 2002).

97 *See, e.g.*, Telecommunications Reporting Worksheet, FCC Form 499-Q, Instructions at 3 (noting that the form must be filed by providers of interstate telecommunications services)

98 *See, e.g., ADMA Telecom, Inc.*, 24 FCC Rcd 838, ¶ 3 (2009)

99 *Id.*

of these quarterly USAC reports is sufficient due diligence to justify Grande Networks' conclusion that its customers are carriers and are likely to contribute to the USF.

2. Confirmation that a customer is a carrier and is reselling telecommunications services is sufficient to satisfy the "reasonable expectation" standard

As discussed, Grande has relied upon a number of factors to determine that its customers qualify as resellers under the FCC's rules. First, Grande has amply shown that its customers, in fact, are telecommunications carriers. Grande sells its wholesale services only through a dedicated wholesale group, and the types of services offered are useful only to other telecommunications carriers. Specifically, the Commission should rule that it is sufficient to confirm that a customer is a telecommunications carrier if the wholesale provider (a) sells through dedicated wholesale channels, (b) demonstrates via customer contracts or other evidence that the customer is a carrier, and (c) can verify, via an FCC authorization, state authorization or the USF contributor database that the entity is a telecommunications carrier.

Second, wholesale carriers can demonstrate via many means that its customers are reselling services as telecommunications. In Grande's case, it relied primarily on the receipt of tax exemption certificates to demonstrate that the customer was purchasing the service for resale as telecommunications. In general, state tax laws exempt sales made for purposes of resale from sales and other state taxes. If a carrier customer provides a tax exemption to its wholesale carrier, it is certifying that the carrier is purchasing that service as a wholesale input to its own end user services. This evidence not only satisfies the tax laws, but it is "reliable proof" that the customer incorporates the purchased services into its own telecommunications services.

Third, the wholesale carrier also has flexibility to demonstrate that the reseller customer can be expected to contribute to the USF directly. So long as the carrier has proof that the customer is not likely to be *de minimis*, evidence that the customer provides telecommunications services to end users is sufficient for the wholesale carrier to "reasonably expect" that the reseller will contribute to the universal service fund. Grande has verified that its customers are telecommunications carriers, and in many instances, the amount of revenue derived from Grande's services alone are sufficient to demonstrate that the customer is not a *de minimis* carrier under the FCC's rules.[100] This customer has an obligation to contribute to the USF, and it is reasonable for Grande to expect that it will do so. Grande respectfully requests that the Commission confirm that Grande's reliance on the customers' volume of services purchased is sufficient to demonstrate a reasonable expectation of contributions to the Fund.

E. USAC is Knowingly Pursuing Recovery of the Same USF Contribution From Grande Networks and Grande Networks' Reseller Customers

Grande's experience with USAC's consideration of one reseller underscores the inconsistencies and errors of USAC's audit results. Despite rejecting Grande Networks' method of identifying and verifying its reseller customers, USAC actually classified one of Grande Networks' customers as a carrier and simultaneously is attempting to collect USF contributions from both Grande Networks and the customer for the same time period.

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100 For example, a carrier is *de minimis* if it would owe less than $10,000 in USF based on end user telecommunications revenues. 47 C.F.R. § 54.708. During the audit period, the USF contribution factor was roughly 9% of end user revenues. As a result, if a carrier had as little as $111,000 in end users revenues, it would be non *de minimis*. Any wholesale customer with half that amount in wholesale invoices from Grande likely would have more than the *de minimis* threshold in end user revenues.

1. The Commission Explicitly Structured the USF Program to Avoid Double Recovery of Contributions

When establishing the USF program, the Commission recognized the potential for USF contributions to be collected more than once on same service revenues.[101] To avoid this result, the Commission chose to base USF contributions on end user revenues instead of on other revenue categories.[102] The Commission chose this contribution method because it would not disadvantage resellers and was less likely to distort competition.[103] The Commission also explicitly noted that this contribution method would "relieve wholesale carriers from contributing directly to the support mechanisms."[104] Notwithstanding these Commission policy objectives, USAC attempts to do exactly what the Commission strove to avoid: recovering more than one USF contribution from the same set of service revenues.

2. USAC has sought recovery of the same USF contribution from Grande Networks and at least one of Grande Networks' reseller customers.

After submitting its responses to the draft audit findings, Grande learned that, at the same time USAC was auditing Grande, it also conducted an audit of one of its customers' 2006 and 2007 499-A filings. These two years coincide with two of the three years at issue in the Grande audit. In the Grande audit, USAC concluded that the customer is an end user. In the customer's audit, however, USAC concluded that the customer is a carrier and must contribute based on its end user revenues. **[BEGIN CONFIDENTIAL]**

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101 *In re: Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 845 (1997).

102 *Id.*

103 *Id.*

104 *Id.*

.[105] **[END CONFIDENTIAL]**

The customer in question is **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL]. USAC's position in the customer's audit confirms Grande's interpretation of the USF rules – and contradicts USAC's position in the Grande audit. Specifically, in the Grande audit, USAC proposes to reclassify **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** in revenues from **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** as Grande "end user" revenues.[106] In the **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** audit, however, USAC concludes that **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** is a telecommunications carrier providing end-user telecommunications services, and therefore that **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** is responsible for contributing to the USF directly. USAC orders **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** to make contributions to the universal service fund, including on revenues derived from reselling Grande's telecommunications services. The complete details of the **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** audit and appeal are described in Exhibit 3.

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105 **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL].

106 *See* Exhibit 8. For each audited year, the amounts are as follows: **[BEGIN CONFIDENTIAL]** 9 **[END CONFIDENTIAL]**.

[BEGIN CONFIDENTIAL] **[END CONFIDENTIAL]** contends that its own customers also are resellers, and therefore that it is not obligated to contribute to the USF.[107] If **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** is correct, then it also follows that Grande – which is a wholesale provider to **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** – similarly is not obligated to contribute on its wholesale revenues from **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**. But even if **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** is incorrect, and consequently if it must contribute directly, Grande is relieved of its obligation to contribute based on revenues received from **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**. In that scenario, **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** is a reseller, is "expected to contribute" to the USF, and Grande properly should report the revenues as wholesale revenues.

By seeking to collect USF contributions from both Grande Networks and Grande's customer for the same telecommunications service revenues, USAC is ordering exactly what the Commission prohibited – double recovery of USF contributions. USAC cannot both contend that **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** was a carrier obligated to contribute to the USF and that Grande must treat revenues from **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** as end user revenues.

The fact that USAC still seeks to collect USF contributions from both the wholesale and the retail carrier demonstrates the fundamental failing of USAC's approach to validating reseller revenues. USAC has been imposing a virtually impossible standard upon

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107 **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL]

wholesale carriers, making them the guarantor of their customers' compliance with FCC rules. Even more troubling, when presented with clear evidence that it was double counting USF revenues, USAC did nothing.

Grande urges the Commission to stop this imposition on wholesale carriers. The Commission should clarify that a wholesale carrier's obligation is to determine if a reseller is, in fact, reselling services as telecommunications and if the reseller can be expected to contribute. The Commission should disavow any claim that a wholesale carrier must confirm actual contributions, and should prohibit USAC from retroactively reclassifying reseller revenues when the reseller fails to contribute. Instead, USAC should be directed to seek collection from the non-compliant reseller. USAC should only reclassify reseller revenues only if the customers can be verified not to be a reseller of telecommunications services.

In fact, this is precisely what the Form 499-A Instructions already direct USAC to do. The Instructions state that a wholesale carrier is responsible for payment of USF on revenues not properly verified only "*if* its customers must be reclassified as end users."[108] Critically, this Instruction does not require reclassification of revenues in all instances where the wholesale carrier failed to follow the verification procedures. This Instruction also does not require reclassification where the reseller failed to pay USF. Rather, a wholesale carrier can only be responsible for the revenues if the reseller, in fact, is an "end user" by application of the FCC's rules. This requires USAC to investigate the reseller in question, especially where, as with **[BEGIN CONFIDENTIAL]** , **[END CONFIDENTIAL]** USAC is simultaneously seeking collection of USF from the reseller.

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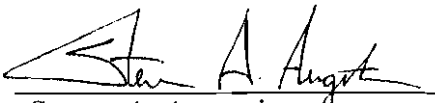
108 *See, e.g.*, 2007 Form 499-A Instructions at 19 (emphasis added).

V. CONCLUSION

For the foregoing reasons, Grande requests the Commission reverse the USAC audit findings on the issues discussed above.

Respectfully submitted,



Steven A. Augustino
Denise N. Smith
Kelley Drye & Warren LLP
3050 K Street, NW
Suite 400
Washington, D.C. 20007
(202) 342-8400 (telephone)
(202) 342-8451 (facsimile)
saugustino@kelleydrye.com
dsmith@kelleydrye.com

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